84-924

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

JEFFREY K. SMITH,

Petitioner,

vs.

GEORGE P. RUSSELL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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and ROBERT L. PAVER
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46 pp

QUESTION PRESENTED

Whether Petitioner, a patrolman for the St. Petersburg Beach Police Department, is a public official within the meaning of New York Times Co. v. Sullivan and its progeny, thereby requiring petitioner to prove actual malice to recover damages in a libel action.

PARTIES BELOW

Jeffrey K. Smith

George P. Russell

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

NO.

JEFFREY K. SMITH,

Petitioner,

v.

GEORGE P. RUSSELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JEFFREY K. SMITH petitions for a Writ of Certiorari to review the decision of the Supreme Court of Florida in this case.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 456 So.2d 462 (Fla.1984). (A.1)

JURISDICTION

The decision of the Supreme Court of Florida was announced on September 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution
Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

28 U.S.C. §1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

§30.07, Fla. Stat. (1981)

Deputy Sheriff.-- Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.

STATEMENT OF THE CASE

This is an action by Petitioner against Respondent for libel.

At the conclusion of the presentation of evidence and testimony the jury was instructed on the law by the trial court, and subsequently reached a verdict in favor of Petitioner and against Respondent, and assessing general damages in the sum of Four Thousand Five Hundred Dollars ($4,500.00) and punitive damages in the sum of Five Thousand Five Hundred Dollars ($5,500.00). (R.13).

The jury was instructed on the common interest privilege, but over Respondent's objection, was not instructed that Petitioner was a public official and that the public official privilege was applicable. The trial court had previously ruled that Petitioner was not a public official.

The trial court rendered judgment in favor of Petitioner, and against Respondent, for the total sum of Ten Thousand Six Hundred Twenty Dollars ($10,620.00) taxable costs included (R.52).

Notice of Appeal to the Second District Court of Appeal for the State of Florida was timely filed. (R.53).

The Second District Court of Appeal reversed the trial court and remanded for new trial on the grounds that the trial court erred in failing to give the public official privilege instruction. Petition for Discretionary Review was timely filed with the Supreme Court of Florida.

The Supreme Court of Florida entered an order accepting jurisdiction and setting oral argument.

The Supreme Court of Florida approved the decision of the Second

District Court of Appeal holding that Petitioner was a public official citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

The earliest stage of the proceedings wherein the federal question of whether Petitioner, as a patrol officer, was a public official was raised at the trial court jury instruction conference. The same federal question was again briefed and argued before the Second District Court of Appeal for the State of Florida. Finally, the same federal question concerning the Petitioner s status as a public official was briefed and argued to the Supreme Court of Florida which affirmed the decision of the Second District Court of Appeal, holding that Petitioner was a public official. (A.1,2).

At the time of the events giving rise to this action, Petitioner

was a patrolman employed by the City of St. Petersburg Beach Police Department. (R.1).

On January 25, 1979, Petitioner, while on duty, observed the Respondent driving his motor vehicle at an extremely high rate of speed and weaving between the lanes of traffic. (R.184, 185). Petitioner stopped the Respondent and upon approaching Respondent's vehicle, Petitioner smelled a strong odor of alcohol. (R.185, 186). Respondent had great difficulty exiting his vehicle and fell against the car twice as he walked to the sidewalk. (R.186). Petitioner administered the standard field sobriety tests, and Respondent failed each test given. (R.187,189). Petitioner arrested Respondent for DUI and handcuffed him. (R.189). Respondent continued to protest his arrest as he entered a police cruiser

for transportation to the police station. (R.189, 190). There another officer administered the Breathalyzer Test; twice Respondent registered .13 indicating legal intoxication. (R.196).

Throughout the custodial period, Respondent was agitated and upset. (R.185-197). Although both Petitioner and another officer explained that the procedures utilized were standardized by law and policy, Respondent continued to strenuously object to having been stopped, the Field Sobriety Test, the arrest, being handcuffed, the Breathalyzer, the holding cell, et cetera. (R.185-197).

Subsequently, Respondent pleaded nolo contendere, and was adjudicated guilty of DUI, fined, and ordered to attend driving school (R.78, 362). At the time of his change of plea, Respondent made a statement to the

Honorable Karl B. Grube, County Judge, concerning his treatment at the time of his arrest. (R.170-171). Judge Grube suggested that Respondent address any grievance he may have had to the St. Petersburg Beach Chief of Police, Robert Miritello. (R.63, 359). Further, Petitioner had suggested to Respondent, on the night of the arrest, that if he felt he should not have been subject to the standard procedures followed by Petitioner, he should contact Chief Miritello. (R.359). When Respondent appeared before the Department of Motor Vehicles Hearing Officer, he again complained of his treatment during arrest and was similarly advised to address his complaint to Chief Miritello.

On March 12, 1979, Respondent wrote the first of three libelous letters to Police Chief Miritello wherein he charged Petitioner with the crime of

brutality, accused him of arrogance, sadism and juvenile behavior, labeled him a petty, insecure egomaniac with a permanent prejudice against everyone who appears to be either educated or affluent, and declared the Petitioner to be a disgrace to his uniform. (R.1-9). Respondent sent copies of this first letter to Judge Grube, Judge Robert Shingler, who had no involvement in the matter, but who Respondent knew personally, Attorney John Robinson who represented the Respondent in his DUI case, and to Petitioner. Upon receipt of a copy of this letter, Petitioner became extremely upset. (R.199). An internal investigation was conducted by the St. Petersburg Beach Police Department, and Petitioner was called upon to defend his actions.(R.116, 117, 199-214). Testimony from Chief Miritello at trial established that the letter was a determining factor

in his decision not to promote Petitioner to sergeant, a position for which he had taken a test and qualified. (R.117-123). Chief Miritello wrote back to Respondent, setting forth the procedures for receipt and investigation of complaints and suggested Respondent avail himself of these procedures. (R.115-117).

On March 29, 1979, Respondent answered the Police Chief's letter stating that he would take no further action and again accused Petitioner of brutality. (R.116-118). Copies of this letter were sent to Judge Grube and Attorney John Robinson. Respondent's third letter was dated April 19, 1979 and addressed to Attorney John Robinson. This letter accused Petitioner of lying under oath at deposition and expressed Respondent's desire to transcribe Petitioner's "incredible" deposition. (R.1-9). Copies of this third letter

were sent to Judge Grube, Chief Miritello, and Petitioner. This action followed.

ARGUMENT

THE COURT SHOULD GRANT THIS WRIT OF CERTIORARI TO DETERMINE HOW FAR DOWN AMONG THE RANKS OF GOVERNMENT EMPLOYEES THE PUBLIC OFFICIAL DESIGNATION EXTENDS FOR PURPOSES OF THE NEW YORK TIMES CO. V. SULLIVAN RULE AND TO OTHERWISE SPECIFY THE CATEGORIES OF PERSONS WHO WOULD OR WOULD NOT BE INCLUDED.

In the instant case, the trial court correctly ruled that Petitioner was not a public official within the meaning of New York Times Company v. Sullivan, 376 U.S. 254 (1964). For the trial court to have ruled otherwise would have permitted virtually all lower echelon government employees to be considered public officials within the New York Times standard.

The Supreme Court of Florida erred in ruling to the contrary, that Petitioner was a public official. This decision of the highest Florida court on

a federal issue is final for purposes of this court's review, notwithstanding that this case has been remanded for new trial since the federal issue has been conclusively decided. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

In New York Times, this court held that, consistent with the First and Fourteenth Amendments, a state can not award damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice, to wit: that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false. As for defining public official, this court stated that it had no occasion

> ". . . to determine how far down in the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons

> who would or would not be included. "376 U.S. at 283 note 23.

Two years later in the decision of Rosenblatt v. Baer, 383 U.S. 75, (1966), this court held that no precise lines need be drawn, since the true test of whether one is a public official is revealed by scrutinizing the motivating force for the New York Times decision. The motivation for New York Times was two fold. First, this court expressed,

> "A profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and second, that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times, supra. at 270.

As reinstated in Rosenblatt,

> "There is, first, a strong interest in debate on public issues and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues."

Rosenblatt, supra. at 85.

In light of these criteria, this court in Rosenblatt stated that the public official designation applies at the least to those among the hierachy of government employees who have, or appear to have, substantial responsibility or control over the conduct of governmental affairs.

This court, in Rosenblatt, stated further:

> "The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protection afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply." Rosenblatt, supra. at 86.

In order for the trial court to have correctly ruled that Petitioner was a public official, Respondent would have had to prove that Petitioner's position in government, as a patrolman for a small beach community, had such apparent importance that the public had an independent interest in the qualifications and performance of Petitioner, beyond the general public interest in qualifications and performance of all government employees. Rosenblatt, supra. at 86. Respondent was unable to present any evidence to establish that Petitioner was other than the lowest ranking of police employees, and, in fact, Petitioner was nothing more than a street level patrolman. Further no evidence exists to support an argument that the interests in public discussion

in the instant case are as particularly strong as they were in New York Times.

In affirming the reversal of the trial court by the Second District Court of Appeal, the Supreme Court of Florida ruled that Petitioner was a public official as a matter of law.

Petitioner's position in government does not place him in the category of a public official as a matter of law. It is well established that the trial court must determine whether the plaintiff in a defamation action is a public official. Rosenblatt, supra at 87, 88. Accord: McCusker v. Valley News, 428 A.2d 493 (N.H. 1981). That the ruling of a trial court is presumed to be correct is axiomatic; thus, if the pleadings and evidence before the trial court indicate any theory or principle of law to support the trial court's judgment, the District Court must affirm

that judgment. Cohen v. Mohaw, Inc., 137 So.2d 22 (Fla. 1962). In the instant case, substantial evidence was presented to the trial court, as well as theory and principle of law, upon which the trial court could base its ruling that Petitioner, as a street level patrolman, could not properly be designated a public official.

The Second District Court of Appeal whose opinion was approved by the Supreme Court of Florida erroneously relied upon St. Amant v. Thompson, 390 U.S. 727, (1968) for the proposition that the police officer therein was a public official as a matter of law. Careful reading of St. Amant discloses that the question presented was whether the Louisiana Supreme Court, in sustaining a judgment for damages, correctly applied the New York Times rule, not whether a deputy sheriff was a public official.

Whether the deputy sheriff, in St. Amant, was a public official within the meaning of New York Times was never presented as an issue for this court. This court, in St. Amant pointed out that the Louisiana Supreme Court, in determining whether the deputy sheriff was a public official, first considered state law and then applied the Rosenblatt test. This court in St. Amant did not hold that a police officer or deputy sheriff, was, as a matter of law, a public official, but specifically stated that it was for the purposes of that case only that this court accepted the deputy sheriff as a public official.

In Florida, deputy sheriffs have the same powers and duties as the sheriff appointing them, which powers and duties are considerably broader than that of a mere patrolman. §30.07 Fla.Stat (1981).

Rosenblatt emphasizes situations in which the interest in public discussion is particularly strong. In 1964, when the decision in New York Times was rendered, the Civil Rights movement had reached its apex. It is manifest that what was factually presented in the New York Times decision was truly a situation in which the interests in public discussion were particularly strong.

A routine arrest for driving while under the influence, as in the instant case, could not have been envisioned by this Court in New York Times or Rosenblatt as being of great public interest.

The few cases to come before this court in which it was alleged that a police officer's position rose to the level of public official involved police officers with superior rank and

supervisory duties, such as a deputy chief of detectives or chief of police. See Time, Inc. v. Pape, 401 U.S. 279 (1971) and Henry v. Collins, 380 U.S. 356 (1965). No evidence was adduced at trial in the instant case to establish that Petitioner held superior rank or was charged with supervisory duties.

Petitioner, as the lowest ranking law enforcement employee in his department, cannot be accurately described as having substantial responsibility for control of governmental affairs nor deserving of an independent public interest beyond the general public interest in the qualifications and performance of all government employees.

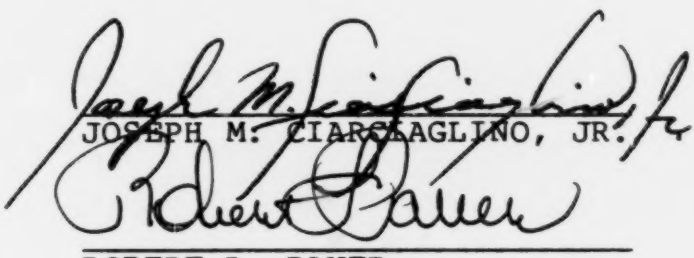
CONCLUSION

For the reasons stated herein Petitioner submits that he, as a mere

patrol officer, is not a public official as contemplated by this court in New York Times Co. v. Sullivan and its progeny.

This Court should issue its Writ of Certiorari to the Supreme Court of Florida to reverse that Court's judgment and remand the case for such further proceedings as may be consistant with this Court's ruling that Petitioner is not a public official within the meaning of New York Times Co. v. Sullivan.

Respectfully submitted,



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APPENDIX

Smith v. Russell,
456 So.2d 462 (Fla.1984). A.1
Russell v. Smith,
434 So.2d 342 (Fla.1984). A.2

SUPREME COURT OF FLORIDA

No. 64,086

JEFFREY K. SMITH, Petitioner,

vs.

GEORGE P. RUSSELL, Respondent

[September 13, 1984]

SHAW, Justice.

This cause, Russell v. Smith, 434 So.2d 342 (Fla. 2d DCA 1983), is before us as conflicting with other decisions of the district courts of appeal. We have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.

Respondent Russell, the defendant, was arrested for driving while intoxicated (DWI) by petitioner/plaintiff Smith, a City of St. Petersburg police officer. At the time of his arrest and later to the judge when he pleaded nolo contendere to the DWI charge, the

defendant complained about the arrest procedure and the plaintiff's use of unnecessary force. Both the judge and the plaintiff suggested to the defendant that he register a complaint with the chief of police.

The defendant wrote three letters detailing his complaints about the plaintiff, one or more of which were sent to the police chief, the traffic court judge, the plaintiff, defendant's attorney, and Judge Shingler, a friend of the defendant. The plaintiff subsequently was passed over for promotion and sued the defendant for defamation.

At trial the defendant requested jury instructions that the plaintiff, as a police officer, was a public official as a matter of law, and that criticism of a public official relating to his official conduct was actionable only upon

a showing of actual malice under New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The trial court refused, but did instruct the jury to consider the applicability of a privilege under the common interest doctrine (the conditional privilege enjoyed by one with an interest or duty regarding the subject matter to comment to another with a corresponding interest or duty). See, e.g., Lewis v. Evans, 406 So.2d 489 (Fla. 2d DCA 1981); Axelrod v. Califano, 357 So.2d 1048 (Fla. 1st DCA 1978). The jury found for the plaintiff, awarding compensatory and punitive damages.

The defendant appealed, claiming the trial court erred in refusing to instruct the jury on the qualified privilege to criticize a public official. The district court reversed on the basis that a policeman is a public official who in order to recover for defamation must

establish that a defamatory communication about him was made with actual malice or reckless disregard for the truth.

The plaintiff argues that refusal to instruct on the public official privilege was harmless error in that a finding of malice was implicit in the jury's punitive damage award; thus, even had the public official instruction been given, the jury's finding of malice would have defeated the privilege. The district court disagreed, finding that"[t]he 'common interest' instruction left the jury free to consider the case as if qualified privilege existed, whereas the 'public official' instruction would have bound the jury to give consideration to a qualified privilege." Smith, 434 So.2d at 344. We approve the district court's decision. A police officer qualifies as a public official as defined in Rosenblatt v. Baer, 383 U.S. 75, 85-86

S.Ct. 669, 675-676, 15 L.Ed.2d 597 (1966):

> Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.
> . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance all government employees, . . . the New York Times malice standards apply. (Footnotes omitted.)

The plaintiff is a highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power. There are probably no public employees more recognizable than armed uniformed police officers. Most citizens are interested in the qualifications and

performance of policeman beyond their general interest in the qualifications and performance of all government employees.

The refusal to give the requested instruction in this instance was not harmless error because the applicable New York Times standard allows public figures or public officials to recover for injury to reputation only upon clear and convincing proof of actual malice. See Bose Corp. v. Consumers Union of United States, Inc., 104, S.Ct. 1949, (1984); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, (1974). Under the proper instruction to which the defendant was entitled, the jury might well have found that there was no showing of malice sufficient to overcome the privilege.

The decision under review approved.

It is so ordered.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - District Conflict of Decisions

Second District - Case No. 82-1478

Joseph M. Ciarciaglino, Jr. and Robert L. Paver of Osborne and Ciarciaglino, St. Petersburg, Florida,

for Petitioner

Elihu H. Berman of Krug, Berman and Silverman, Clearwater, Florida,

for Respondent

Parker D. Thomson, Sanford L. Bohrer and Gary B. Pruitt of Thomson, Zeder, Bohrer, Werth, Adorno and Razook, Miami, Florida; and Richard J. Ovelmen, General Counsel, Miami, Florida,

Amicus Curiae for the Miami Herald Publishing Company

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GEORGE P. RUSSELL,	)
	)
Appellant,	)
	)
v.	)
	)
JEFFREY K. SMITH,	)
	)
Appellee.	)

Opinion filed July 15, 1983.
Appeal from the Circuit Court for Pinellas County; Michael N. Athanason, Judge.

Elihu H. Berman of Krug, Berman & Silverman, Clearwater, for Appellant.

Joseph M. Ciarciaglino, Jr. of Osborne & Ciarciaglino, St. Petersburg, for Appellee.

LEHAN, Judge

Defendant, George P. Russell, appeals from a jury verdict for compensatory and punitive damages in an action for defamation. We reverse.

Russell was arrested by plaintiff, Jeffrey K. Smith, a City of St. Petersburg Beach police officer, and charged with DWI. At the time of his arrest, Russell complained about the arrest procedures and Smith's conduct. Russell repeated those complaints to the traffic court judge when Russell pleaded nolo contendere in court. Both Smith and the judge suggested that Russell register a complaint with the chief of police.

Russell then wrote three letters of detailing his complaints about Smith. Among other things, these letters accused Smith of being a sadist and a liar and of using unnecessary force. Copies of one

or more of these letters were sent to the chief of police, the traffic court judge, another judge who was a friend of Russell, Russell's attorney, and Smith. The statements made in the letters were the bases of Smith's suit against Russell for defamation.

At trial Russell requested that the court instruct the jury that Russell had a qualified privilege to criticize Smith because Smith was a police officer and was, therefore, a public official. Russell argued that a showing of actual malice on the part of Russell was necessary to overcome the qualified privilege and sustain a verdict for Smith. The trial court did not give the requested instruction but did instruct on the so-called "business privilege" or "common interest doctrine." The court instructed the jury to consider the defendant's claim that the statements

were made by a person with an interest or duty in the subject matter to another person with an interest or duty in the subject matter and were, therefore, conditionally privileged. The jury returned a verdict for Smith, awarding $4,500 in compensatory damages and $5,500 in punitive damages.

Russell's first point on appeal is that the trial court erred in refusing to instruct the jury on the privilege that existed in Russell's favor because Smith, a police officer, was a public official. We agree. Florida case law has characterized a police officer as a public official "subject to fair comment and criticism from any member of the public . . ." White v. Fletcher, 90 So.2d 129, 131 (Fla.1956). See also Harrison v. Williams, 430 So.2d 585 (Fla. 4th DCA 1983). Thus to establish that he has been defamed, a police officer must

show that the communication was made with malice or reckless disregard for the truth. See St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

Smith argues that even if the trial court erred in not instructing the jury that communications about a police officer were qualifiedly privileged, the error was harmless. The privilege can be overcome by a finding of malice, and Smith argues that the award of damages despite the "business privilege" instruction and also the award of punitive damages show that the jury must have found that the communications were made with malice.

We cannot accept Smith's argument. To do so would require that we disregard constitutional safeguards of freedom of speech contained in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11

L.Ed.2d 686 (1964). "The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws." Coursey v. Greater Niles Township Publishing Corp., 40 Ill.2d 256, 239 N.E.2d 837, 841 (1968). The very fact that police officers perform functions so essential to the effective operation of our democratic form of government and are entitled to honor and respect also means that they must bear the burdens of their commissions, one of which is to be subject to certain criticism by members of the public.

In any event, whether or not basic constitutional rights are controlling, we think the failure to give the "public

official" instruction should not be viewed as harmless error. To buttress his argument that failure to instruct on the "public official" privilege was harmless error, Smith cites Nodar v. Galbreath, 429 So.2d 715 (Fla. 4th DCA 1983). In Nodar, the jury awarded damages to plaintiff, a public school teacher, in her defamation action against the parent of one of her students. The parent appealed, claiming as error the trial court's failure to instruct on the "public official" privilege. The Fourth District found no harmful error, noting that the jury had been instructed on the "common interest" privilege and had found that privilege to exist, but had concluded that the statements were made with actual malice. However, we are not persuaded that Nodar represents principles which should control the case before us. The court in Nodar did not

-each the "public official" issue which controls this case. Also, we are not convinced that the giving of the "common interest" instruction to the jury in this case rendered harmless the failure to give "public official" instruction requested by Russell. If the jury found no "common interest" to exist, the jury would not necessarily have considered the case in the same light as it would have if the "pubic official" instruction had been given. The "common interest" instruction left the jury free to consider the case as if no qualified privilege existed, whereas the "public official" instruction would have bound the jury to give consideration to a qualified privilege.

[3] We by no means would condone unjustified and scurrilous accusations against police officers. However, we do not reach the question of whether the

letters in this case fall into that category and are outside the bounds of what the Florida Supreme Court in White referred to as "fair comment and criticism," except to say the trial court did not err in denying Russell's motion for a directed verdict on the ground of lack of evidence of malice. Our holding is simply that Russell was entitled to a jury instruction as to, and jury consideration of, the foregoing qualified privilege.

Russell's second point on appeal--that the trial court erred in failing to offer a remittitur as to the amount of punitive damages awarded--is moot.

REVERSED AND REMANDED FOR NEW TRIAL.

HOBSON, A.C.J., and BOARDMAN, J., concur.

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IN THE

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OCTOBER TERM, 1984

JEFFREY K. SMITH,

Petitioner,

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GEORGE P. RUSSELL,

Respondent,

No. 84-924

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent George P. Russell, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Florida Supreme Court opinion in this case. That opinion is reported at 456 So.2d 462 (Fla. 1984).

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QUESTION PRESENTED

Whether this Court should grant this writ of certiorari to determine how far down among the ranks of government employees the public official designation extends for purposes of the New York Times Co. v. Sullivan rule and to otherwise specify the categories of persons who would or would not be included.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a question relevant to United States Constitutional Amendment I; United States Constitutional Amendment XIV; 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

On September 13, 1984, the Florida Supreme Court issued its opinion in the case sub

judice. Respondent believes that the statement of facts as set out in Petitioner's brief is inaccurate and prejudicial in that certain facts are exaggerated. Because the opinion concisely sets forth the facts, portions of that opinion are repeated below:

"Respondent Russell, the defendant, was arrested for driving while intoxicated (DWI) by petitioner/plaintiff Smith, a City of St. Petersburg police officer. At the time of his arrest and later to the judge when he pleaded nolo contender to the DWI charge, the defendant complained about the arrest procedure and the plaintiff's use of unnecessary force. Both the judge and plaintiff suggested to the defendant that he register a complaint with the chief of police.

"The defendant wrote three letters detailing his complaints about the plaintiff, one or more of which were sent to the police chief, the traffic court judge, the plaintiff,

defendant's attorney, and Judge Shingler a friend of the defendant. The plaintiff subsequently was passed over for promotion and sued the defendant for defamation.

"At trial the defendant requested jury instructions that the plaintiff, as a police officer, was a public official as a matter of law, and that criticism of a public official relating to his official conduct was actionable only upon a showing of actual malice under New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The trial court refused, but did instruct the jury to consider the applicability of a privilege under the common interest or duty regarding the subject matter to comment to another with a corresponding interest or duty. See, e.g., Lewis v. Evans, 406 So. 2 489 (Fla. 2d DCA 1981): Axelrod v. Califano, 357 So. 2d 1028 (Fla. 1st DCA 1978). The jury found for the plaintiff, awarding compensatory and punitive damages.

"The defendant appealed, claiming the

trial court erred in refusing to instruct the jury on the qualified privilege to criticize a public official who in order to recover for defamation must establish that a defamatory communication about him was made with actual malice or reckless disregard for the truth."

"The plaintiff argues that refusal to instruct on the public official privilege was harmless error in that a finding of malice was implicit in the jury's punitive damage award; thus, even had the public official instruction been given, the jury's finding of malice would have defeated the privilege. The district court disagreed, finding that "[t]he 'common interest' instruction left the jury free to consider the case as if no qualified privilege existed, whereas the 'public official' instruction would have bound the jury to give consideration to a qualified privilege." Smith, 434 So. 2d at 344. We approve the district court's decision. A police officer qualifies as a public official as

defined in Rosenblatt v. Baer, 383 U.S. 75, 85-86, (1966)."

On September 13, 1984, the Florida Supreme Court approved the decision of the Second District Court of Appeal and the decision of the appellate court which reversed and remanded the case for new trial. Russell v. Smith, 434 So. 2d 342.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below is in harmony with the decisions of the court, the Supreme Court of Florida and courts of other states as to whether a police officer is a public official.

New York Times v. Sullivan and its progeny have held in an unbroken line of decisions that police officers are "public officials".[1] Petitioner offers in response to this unanimous and overwhelming body of precedent only the erroneous argument that the rationale of New York Times v. Sullivan does not support these holdings. In fact, as shown below, all courts which have considered the issue have held all police officers, of whatever rank or title, to be

1. While most of these decisions appear to involve only the press, it has been clear since New York Times v. Sullivan, 376 U.S. 254 (1964), that the citizen is equally protected. As the Supreme Court noted in Sullivan, "we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press." Id. at 265.

"public officials" because police play a unique and critical role in the maintenance of this society. Police directly wield extraordinary and virtually unsupervised governmental power over the public at large. For this reason public debate about the conduct of police must be "wide-open and robust". Only application of the actual malice rule can secure such freedom of expression.

Courts Have Universally Found Law Enforcement Libel Plaintiffs To Be "Public Officials"

Long before the United States Supreme Court constitutionalized the law of defamation the Florida Supreme Court determined that police officers are "public officials" under the Florida common law of libel. White v. Fletcher, 90 So.2d 129 (Fla. 1956); see also Wardlow v. City of Miami, 372 So.2d 976, 979 n4 (Fla. 3d D. C. A. 1979). Florida courts created a qualified privilege allowing members of the public to

freely comment on the actions of public officials. The Florida Supreme Court has held:

> "...any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval."

Kennett v. Barber, 159 Fla. 81,83, 31 So.2d 44,46 (1947).

This early case became the cornerstone for the Florida Supreme Court decision that held a uniformed policeman is a public official: White v. Fletcher, supra. Here, the plaintiff was a police officer for the City of Orlando, who received much public attention because he was a witness in the prosecution of a prostitute in whose activities he was allegedly involved. The court based its decision on the following rationale:

> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of

> the City of Orlando. The generally accepted rule is that "public officials" or "public men" are subject to such fair comment. Cason v. Baskin, 159 Fla. 31, 30 So.2d 635. This court has said a person whose duty it is to perform agency for the State is a "public officer," and that a person in the service of the government who derives his position from duly authorized election or appointment is a public officer. State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721. There could be little doubt that a policeman, then, is a "public officer."
>
> White v. Fletcher, 90 So. 2d 129 at 131 (Fla. 1956).

Thus, in large measure Florida anticipated the development of the federal constitutional protection that has been afforded speech about public officials in the 20 years since New York Times v. Sullivan.

In New York Times v. Sullivan, the United States Supreme Court constitutionalized libel law by holding a "public official" may not recover damages for a "defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'

- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. In explicating the New York Times v. Sullivan standard, the Supreme Court has held the public official must show with "clear and convincing proof," Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), "that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

Although not every person on government payroll is a public official, Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979), "every court that has faced the issue has decided that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law." Roche v. Egan, 433 A.2d 757, 762 (Me. 1981); see generally, Libel and Slander: Who Is A Public Official Or Otherwise

Within The Federal Constitutional Rule Requiring Public Officials To Show Actual Malice, 19 A.L.R. 3d 1361 Section 5(d) (1968) and Supp.1983).

Law enforcement personnel of every rank and description have been held to be 'public officials' for libel purposes, including wardens or prisons,[2] chiefs of police,[3] sheriffs,[4] deputy

2. West v. New York Daily News, 5 Med. L. Rptr. 1269 (N.Y. Sup. Ct. 1979) (warden at the Brooklyn House of Detention conceded he was a public official).

3. Jurkowski v. Crawley, 637 P.2d 56 (Okla. 1981); Brophy v. Philadelphia Newspapers, Inc., 281 Pa. Super. 588, 422 A.2d 625 (1980); Goolsby v. Wilson, 146 Ga. App. 288, 246 S.E.2d 371 (1978); Henry v. Collins, 380 U.S. 356 (1965); Ashton v. Commonwealth, 405 S.W.2d 562 (Ky. 1965), rev'd. on other grounds, 384 U.S. 195 (1966); Kidder v. Anderson, 354 So.2d 1306 (La. 1978), cert. denied, 439 U.S. 829 (1978).

4. Foster v. Upchurch, 624 S.W.2d 564 (Tex. 1981); Hoag v. Clegg, 5 Med.L. Rptr. 1732 (Mich. Cir. Ct. 1979) (both sides stipulated that plaintiff was a public official).

sheriffs,[5] deputy chiefs of detectives,[6] police captains,[7] sergeants,[8] detectives,[9] federal drug

5. Romero v. Abbeville Broadcasting Service, 420 So.2d 1247 (La. App. 1982); Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App. 1977) cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 906 (1978); Hirman v. Rogers, 257 N.W.2d 563 (Minn. 1977); Cline v. Brown, 24 N.C. App. 209, 201 S.E.2d 446 (1974), cert. denied, 286 N.C. 412, 211 S.E.2d 793 (1975); St. Amant v. Thompson, 390 U.S. 727 (1968).

6. Time Inc. v. Pape, 401 U.S. 279 (1971).

7. McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152 (Iowa 1976) (court implicitly found plaintiff to be a public official; Thuma v. Hearst Corp., 340 F.Supp. 867 (Md. 1972); Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W.2d 1 (1968).

8. Seymour v. A.S. Abell Company, 557 F.Supp. 951 (Md. 1983); Rosales v. City of Eloy, 122 Ariz. 134, 593 P.2d 688 (Ct. App. 1979); Ramacciotti v. Zinn, 550 S.W.2d 217 (Mo.Ct. App. 1977); Corbett v. Register Publishing Co., 33 Conn.Supp. 4.

9. Roche v. Egan, 433 A.2d 757 (Me. 1981); Colombo v. Times-Argus Assn., 135 Vt. 454, 380 A.2d 80 (1977).

agents,[10] federal customs inspectors,[11] state highway patrolmen,[12] and city investigators.[13]

10. Hansen v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (Ct.App. 1981); Hart v. Playboy Enterprises, Inc., 5 Med.L. Rptr.1811 (D.Kan. 1979); Meiners v. Moriarty, 563 F.2d 343 (7th Cir. 1977).

11. Torres v. Playboy Enterprises, Inc., 7 Med. L.Rptr. 1182 (S.D.Tex. 1980).

12. Roberts v. Dover, 525 F.Supp. 987 (M.D.Tenn. 1981); NAACP v. Moody, 350 So.2d 1365 (Miss. 1977).

13. Bishop v. Wometco Enterprises, Inc., So.2d 759 (Fla. 3d DCA 1970), cert. denied, 240 So.2d 813 (Fla. 1970).

More important still, the state and federal courts have uniformly found that police patrolmen are public officials.[14]

14. Harrison v. Williams, 430 So.2d 585 (Fla. 4th DCA 1983); Hines v. Florida Publishing Co., 7 Med.L. Rtr. 2605 (Fla. 4th Jud. Cir. Ct. 1982); Willis v. Perry, 10 Med. L. Rptr. 1217 (Colo.App. 1983); Seymour v. A. S. Abell Company, 557 F.Supp. 951 (D. Md. 1983); Gomes v. Fried, 136 Cal. App.3d 924, 186 Cal. Rptr. 605 (1st Dist. 1982); Dunlap v. Philadelphia Newspapers, Inc., 301 Pa. Super. 475, 448 A.2d 6 (1982); Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761 (N.J. 1981); Shafer v. Lamar Publishing Co., 621 S.W.2d 709 (Mo. App. 1981); McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980); Angelo v. Brenner, 84 Ill. App.3d 594, 40 Ill.Dec 337, 406 N.E.2d 38 (1980); La Rocca v. New York News, Inc., 156 N.J. Super. 59, 383 A.2d 451 (App. Div. 1978); Malerba v. Newsday, Inc., 64 App. Div.2d 623, 406 N.Y.S.2d 532 (2d Dept. 1978); Orr v. Lynch, 60 App. Div.2d 949, 401 N.Y.S.2d 897 (3d Dept. 1978), aff'd., 45 N.Y.2d 903, 411 N.Y.S.2d 10, 383, N.E.2d 562 (1978); Della v. Berkey, 41 Md.App. 47, 395 A.2d 1189 (1978), aff'd., 287 Md. 302, 413 A.2d 170 (1980); Akins v. Altus Newspapers, Inc., 609 P.2d 1263 (Okla. 1977), cert. denied, 449 U.S. 1010 (1980); Dellinger v. Belk, 34 N.C.App. 288, 238, S.E.2d 788 (1977), cert. denied, 294 N.C. 182, 241 S.E.2d 517 (1978); Weber v. Woods, 31 Ill. App.3d 122, 334 N.E.2d 857 (1975); Rawlins v. Hutchison Publishing Co., 218 Kan. 295, 543 P.2d 988 (1975); Moriarty v. Lippe, 162 Conn. 371, 294 A.2d 326 (1972); Rowden v. Amick, 446 S.W.2d 849 (Mo. App. 1969); Coursey v. Greater Niles Township Publishing Corp., 40 Ill.2d 257, 239 N.E.2d 837 (1968); Scelfo v. Rutgers University, 116 N.J. Super. 403, 282 A.2d 445 (1971).

These courts hold that patrolmen "perform governmental duties directly related to the public interest and have or appear to have substantial responsibility for or control over the conduct of governmental affairs," Scelfo v. Rutgers University, 116 N.Y. Super.403, 282 A.2d 445 at 449 (1971), and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981).

"Although a comparably low-ranking government office, a patrolman's office, if abused, has great potential for social harm." Moriarty v. Lippe, 162 Conn. 371 294 A.2d 326 at 330 (1975). A police officer investigates crimes, makes arrests, and is "vested with substantial responsibility for the safety and

welfare of the citizenry in areas impinging most directly and intimately on daily living: the home, the place of work and of recreation, the sidewalks and streets." Roche v. Egan, supra at 762. The nature and extent of the responsibility of a police officer "is punctuated by the fact that a firearm, no less than a badge, comes with his office." Id. As a Missouri court correctly pointed out for the 250 families residing in the village of Lake Tapawingo the actions and activities of their local police "were probably of more direct concern....that were the doings of the Director of the F.B.I." Rowden v. Amick, supra at 8857.

In Coursey v. Greater Niles Township Publishing Corp., supra, a patrolman on a municipal police force brought suit against a local newspaper alleging he had been defamed. In concluding that a patrolman is a public offical under federal constitutional law the Illinois

Supreme Court held that:

"Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparable low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws."

239 N.E.2d at 841.

Similarly, the Tenth Circuit Court of Appeal explained why a patrolman in Rock Springs, Wyoming must be regarded as a public official:

> The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily

> injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and performance warrant the conclusion that he is a public official.

Gray v. Udevitz, 656F.2d 588, 591 (10th Cir. 1981).

Seldom is precedent on a single issue so extensive and uniform. Since the case sub judice offers no real or important issues different from the cases discussed above, it does not merit the ear of this Court.

2. It would be unduly cumbersome for this Court to entertain the question found in the Petitioner's Argument.

Petitioner's Argument centers upon the following proposal:

> The court should grant this writ of certiorari to determine how far down among the ranks of government employees the public official designation extends for the purposes of the New York Times Co. v. Sullivan rule and to otherwise specify the categories of persons who would or would not be included. (Petitioner's brief pp. iii, and 14).

In order for this court to meet the objective of this proposal, it would have to examine a myriad of government jobs. In its analysis, the court would have to evaluate thousands of jobs from the most sophisticated to the most ministerial. Such an endeavor would include employees such as F.B.I. Agents, C.I.A., janitors, nuclear power plant administrators and judicial publishers. Such a task is, not only, burdensome for this court, but also, unnecessary at this time. The decision below turns on its own facts and affects few if any other litigants.

3. The decision below does not meet the requirements nor the except to finality. Therefore, this Court does not have jurisdiction to grant a writ of certiorari.

Upon examining federal statutes regarding the jurisdiction of the Supreme Court, it is evident that the case sub judice does not

meet the statutory requirements of 28 U.S.C. Section 1257, i.e. finality. Strict construction of this statute along with cases that interpret it dictate that "[r]eview can only be had of "final judgments or decrees."[15]

However, in recent years the Court has departed[16] from its strict interpretation of the jurisdictional statute, 28 U.S.C. 1257(3), in Cox Broadcasting Corp. v. Cohn,[17] the court explained the limited exceptions for which it would hear cases when finality was questionable, by saying:

15. C.A. Wright, Law of the Federal Courts (3d ed. 1976), p. 537, and R.L. Stern & E. Gressman, Supreme Court Practices (5th ed. 1976) pp. 177-183. See also the following line of cases which held that a judgment or decree of the highest court of state reversing an inferior court and specifically remanding the case to the lower court for a new trial is not a final judgment, and hence is not reviewable by the United States Supreme Court. Houston v. Moore, 16 U.S. 433 (1815); Urie v. Thompson, 337 U.S. 163 (1949).

16. Law of Federal Courts, supra pp.539-540.

17. 420 U.S. 469.

> "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." (emphasis added).

420 U.S. 46 at 482-483.

Although this case may fall into the same category as Cox, supra, it does not merit this Court's audience since it does not "seriously erode federal policy."

18. Law of Federal Courts, supra pp.539-540.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of February, 1985, three copies of the Respondent's Brief In Opposition of the Petition for Writ of Certiorari were mailed, postage prepaid, to Joseph M. Ciarciaglino, Jr., Esquire; of Osborne & Ciarciaglino, 433 Fourth Street North, St. Petersburg, Florida 33701, counsel for the Petitioner. Further, I certify that all parties required to be serviced have been served.

/s/

ELIHU H. BERMAN

Council for the Respondent